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THE SLIPPERY SLOPE AND ITS TENDENCY TO RESULT IN POOR POLICY DECISIONS

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When evaluating a potential outcome of a disputed issue, a 'slippery slope' argument can almost always be made. In the abstract, it looks like this: if acceptable proposal, X, is adopted, unacceptable position, Y, will inevitably follow. In other words, if citizens are allowed to carry concealed handguns, it will lead to shootouts in the streets.[1] In situations such as this, the slippery slope argument urges policy makers to base their decision on fear of an avoidable result rather than the merits of the policy in question. While the slippery slope argument is often effective, its use generally leads to sub-optimal policy decisions.

This paper considers the role of the slippery slope argument in three sections. The first section, Quantitative Analysis, proposes a mathematical formula for understanding the underlying mechanics of the slippery slope argument. The second section, Slippery Slope Arguments in Public Policy Debates, examines the use of the slippery slope in practice. Finally, the third section, Use of the Slippery Slope in the Courtroom, explores the function of the slippery slope in judicial decision making.

I. QUANTITATIVE ANALYSIS

It is important to understand the underlying mechanics of the slippery slope. This section breaks down the argument into its constituent parts (four prerequisite conditions for the argument and three variables that determine its effectiveness) and quantifies them for further analysis. It is also important to clearly define a slippery slope argument.[2] This author

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1. Eugene Volokh, *Mechanism of the Slippery Slope*, 116 HARV. L. REV (2003). This article provides a comprehensive analysis of the Slippery Slope argument. While his conclusions are often at odds with the conclusions of this paper, his article provides a substantial resource for this discussion. The context for that article is the debate over gun control.

2. Frederick Schauer, *Slippery Slopes*, 99 HARV. L. REV. 361, 364–68. (1985) (providing an extended "analytic isolation" of the slippery slope argument for the purposes of that article). My brief explanation of the slippery slope argument that will be addressed mirrors his comprehensive

defines a true slippery slope as: the acceptance of X will lead to an unacceptable increase in the likelihood of Y. This type of argument is generally offered in an effort to stop the adoption of a certain policy. However, if X is a good policy decision but is not undertaken because of a threatened but avoidable risk of Y, public policy will suffer from slippery slope inefficiency.[3] For the sake of clarity, this author will use the common phrase "give them an INCH (X) and they will take a MILE (Y)" in the examples below.

There are four conditions that are generally present when a slippery slope argument is made. First, one side is opposed to INCH (either on its own merits or because of its likelihood to lead to MILE).[4] Second, there must be an audience that is undecided as to whether INCH is acceptable (if the audience is simply against INCH, the slippery slope argument is more like rhetoric). Third, in order for the argument to have any persuasive influence, MILE must be less desirable than INCH (to be *truly* effective there should be near unanimity as to the undesirability of MILE). Fourth, there is a perceived possibility that INCH will lead to MILE.

There are also three variables that must be considered when quantifying a slippery slope argument: (1) the level of support for INCH among the audience (S); (2) the level of disapproval of MILE among the audience (D); and (3) the increased likelihood of MILE as perceived by the audience if INCH is accepted (L).[5]

To illustrate, given:

S = Current level of support of INCH, 1 – 10
D = Current level of disapproval of MILE, 1 – 10
L = Increased likelihood of MILE if INCH is accepted, 0-1

Suppose:

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definition. I attempt to make a similar stipulation here that will allow an examination of what I call true slippery slope arguments.

3. Eric Lode, *Slippery Slope Arguments and Legal Reasoning*, 87 CAL. L. REV. 1469 (1989).

4. For the purpose of the quantitative analysis I will accept the proposal that the slippery slope argument most often does not concede that the instant case is acceptable on its own but that we should not accept it because of the chance of sliding down the slope to an unacceptable result. Although it may be the case that some slippery slopes are employed by a speaker that does not oppose the instant case on its own merits more often it is not. *See* Ann Scales, *Feminist Legal Method: Not so Scary*, 2 UCLA WOMEN'S L.J. 1, 15 (1992). "Second, the slippery slope is often disingenuously invoked. In structure, the slippery slope argument concedes the innocuousness of regulating the instant case but posits impossibly harder cases down the road."

5. For a review of the use of quantitative analysis as a tool for dissecting logical arguments see E. J. LEMMON, BEGINNING LOGIC (Hacket Publ'g 1965).

There is an audience neutral towards INCH (S = 5); and
that audience is opposed to MILE (D = 8); and
an advocate makes a strong argument that INCH leads to MILE
(L = .75).

Then:

Taking D and multiplying it by L results in a new disapproval level, D':
(D x L) = D'
8 x .75 = 6

Therefore:

Since the magnitude of D' is 6, and S remains unchanged at 5, the negative reaction to MILE still outweighs the positive value of INCH.
(D x L) = D' > S
8 x .75 = 6 > 5
Note that, keeping all else the same while decreasing the magnitude of L can result in the slope becoming less slippery:

Assume:

A decrease in the likelihood of INCH leading MILE (L = .5).

Then:

D' is now 4 while S remains unchanged at 5.

Therefore:

The negative reaction to MILE no longer outweighs the positive value of INCH.
(D x L)= D'< (S)
8 x .5= 4 < 5

The foregoing section elucidates the simple dynamics of the slippery slope argument. Regardless of how slippery a slope is, D' of MILE must be greater than S of INCH; otherwise, the slippery slope argument will be ineffective. The greater an individual's ability to demonstrate the slipperiness of a slope (L), the more effective a slippery slope argument will

be.

II. SLIPPERY SLOPE ARGUMENTS IN PUBLIC POLICY DEBATES

This section considers the use of the slippery slope argument in public policy debates in four parts. The first part, The Choice of Two Evils, illustrates the absurd choices a policy maker will face when advocates on both sides of an issue employ slippery slope arguments. The second part, Is There any Beneficial Use of the Slippery Slope?, explores the potential use of the slippery slope argument as an analytical tool. The third part, Manipulating the Slipperiness of the Slope, considers different ways to affect the variables of a slippery slope argument in order to make it more effective. Finally, the fourth part, Inefficiencies of the Slippery Slope, demonstrates the process by which a slippery slope argument may heighten fear of an avoidable consequence and result in rejection of sound public policy.

A. THE CHOICE OF TWO EVILS

Slippery slope arguments are notoriously easy to make. For any policy choice, one can dream up some disastrous result that might occur down the road. The result of both sides employing a slippery slope argument is that either choice appears to lead to disaster. In light of this, the slippery slope argument adds little to any debate and instead encourages a contest of which side can imagine a worse result.

Eugene Volokh has defended the use of a slippery slope argument in reference to the right to carry firearms.[6] I will borrow this issue as an illustration. When one side argues that allowing concealed carry leads to shootouts in the streets and the other side argues that prohibiting concealed carry leads to criminal takeover, it is more difficult to identify the better policy.

No one wants shootouts in the streets; public opinion is united on this point. One can assume, however, that part of the population is undecided about whether citizens should be able to carry concealed weapons. If this undecided faction accepts the premise that concealed carry will lead to shootouts, it will decide that granting the right to carry a concealed weapon is not worth the resulting shootouts. The same argument can be made in the other direction.

Which side is right? Maybe both are correct. When a decision whether to allow concealed carry must be made in light of these arguments, policy makers appear to be choosing between shootouts and criminal takeover.

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6. Volokh, *supra* note 1.

What if neither side is right? What if, while allowing conceal carry, it remains possible to stop a slide down to shootouts? Or, in the event gun laws are tightened, it remains possible to get off the slope before society finds itself in the midst of criminal takeover? One or both of the slippery slope arguments must be refuted in order to identify an acceptable choice.

An effective slippery slope argument hinges upon the connections between the proposal at issue and the threatened catastrophic result. Why would allowing concealed carry result in shootouts? How certain is the threatened catastrophic result? If policy makers are able to distinguish between the proposal at issue and the catastrophic result now, why won't they be able to make this distinction later?

B. IS THERE ANY BENEFICIAL USE OF THE SLIPPERY SLOPE?

Slippery slopes can force people to examine the underlying rationale of an argument. Consider the concealed carry hypothetical above. Several logical frameworks support a pro-gun position. Police carry guns and they deter crime; if more individuals carry guns more crime will be deterred.[7] Criminals disregard concealed carry laws so the only individuals barred by anti-gun legislation are those that would carry them for good purposes. Finally, the U.S. Constitution protects every individual's right to bear arms, so a state does not have the authority to bar it citizens from carrying guns. At the same time, these logical frameworks can also support the anti-gun position. Police carry guns and they deter crime; therefore it is unnecessary for individuals to carry concealed guns.

If a pro-gun advocate bases his or her argument on the Constitution, the implication is that everyone should be able to carry a concealed gun. Going down a slippery slope, this sets the stage for the shootouts. But are anti-gun laws the only thing standing between the current state of affairs and the OK Corral? Is it not likely that fear of death, fear of arrest, and morality also act as adequate safeguards against shootouts? As one can see, it is often difficult to discern an exact causal relationship.

On a theoretical level, the use of the slippery slope argument leads to an absurd choice between two unacceptable results. However, in practice it occasionally has utility. The advocate who is aware of the pitfalls of slippery slope arguments is able to identify the underlying validity (or invalidity) of such arguments. In doing so, the advocate may be able show that an opponent's reasoning does not necessarily lead to the proposed bad result.

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7. JOHN R. LOTT, JR., MORE GUNS, LESS CRIME: UNDERSTANDING CRIME AND GUN CONTROL LAWS (Univ. of Chicago Press 1998).

C. MANIPULATING THE SLIPPERINESS OF THE SLOPE

There are ways to make a slippery slope argument more effective. This can be done by adjusting its variables.

1. Changing the Acceptability of Y.

An opponent of X might attempt to make Y so undesirable that an audience will be unwilling to accept even a very slight risk of Y occurring. Consider the debate surrounding physician assisted suicide.[8] If a speaker can convince her audience that physician assisted suicide will lead to summary execution at age 30, that audience is unlikely to even consider physician assisted suicide.[9]

A proponent of X should try to minimize the disapproval of Y. For example, in the debate surrounding gay marriage, polygamy is often offered as the disastrous result. Supporters of gay marriage would benefit if they were able to reduce the disapproval of polygamy. Interestingly, supporters of gay marriage have not attempted this. Instead, they have attempted to decrease the likelihood of gay marriage leading to polygamy.[10]

2. Minimizing the Possibility of Slippage

Supporters of X may argue against the strength of causal links between X and Y and suggest that the slope is not as steep as the opposition asserts; thus, X will not necessarily lead to Y. Also, X's supporters may concede a link between X and Y, but that the slope can be stepped off of at any point.

If allowing X automatically leads to Y, it would be a simple 'if then' argument. However, a proper slippery slope argument must have several intermediary steps between X and Y.[11] Because these steps between X and Y exist, there should be an opportunity to get off the slope at those steps.[12]

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8. Thomas Szasz, *Killing Kindness*, REASON, May, 1994, at 40.

9. LOGAN'S RUN (MGM 1976) (in this science fiction movie citizens are summarily executed at the age of thirty).

10. Conservative commentators have repeatedly made the slippery slope argument from gay marriage to polygamy. For example, The *Weekly Standard* contained the article *Beyond Gay Marriage*. This article contained a quote that attempted to disassociate gay marriage from polygamy. "Andrew Sullivan, one of gay marriage's most intelligent defenders, labeled the question fear-mongering—akin to the discredited belief that interracial marriage would lead to birth defects. 'To the best of my knowledge,' said Sullivan, 'there is no polygamists' rights organization poised to exploit same-sex marriage and return the republic to polygamous abandon.' Actually, there are now many such organizations. And their strategy—even their existence—owes much to the movement for gay marriage." Stanley Kurtz, The Road to Polyamory, WEEKLY STANDARD, August 4, 2003.

11. Lode, *supra* note 3, at 1477.

12. Stephen Smith, *Fallacies of the Logical Slippery Slope in the Debate on Physician Assisted Suicide and Euthanasia*, 13 MED L. REV. 224, 239 (2005) (Smith disagrees with the assertion that a Doctor will make a unilateral decision to end a patient's life, noting that most of the proposed legislation relating to physician assisted suicide require a second independent

A person who employs a slippery slope argument should be put to her proof to explain why a principled line can not be drawn between X and Y.

While it benefits the party employing a slippery slope argument to enumerate the reasons X will lead to Y, the party in support of X should make clear that the burden of proving the linkage is on the opposition. The party in support of X can weaken or nullify a slippery slope argument to the extent it shows that X does not necessarily lead to Y. As noted above, this is done by either reducing the link between X and Y, or by providing stepping off points along the slope.

D. REDUCING INEFFICIENCIES OF THE SLIPPERY SLOPE

Should policy makers yield to the logic of the slippery slope, they may be tempted to settle for less than optimum policies. Imagine a city council is considering a policy that will provide subsidies to individuals who open a small business. The council finds that the subsidies are cost effective, that they are in line with the city's economic development plan, and that there exists a sufficient need. However, certain members of the council are concerned that if they approve this measure they will soon have to approve subsidies for medium and large businesses. They worry that corporate welfare will soon dry up the city's coffers. Therefore, the council should determine whether a non-arbitrary line can be drawn that allows subsidies for small businesses but not for medium and large businesses. In the end, without proper analysis, the small business subsidy may be rejected not on its own merits, but for fear of corporate welfare.

Unfortunately, this analysis is often overlooked. In the city council example above, the specter of corporate welfare may persuade a sufficient number of council members to block the passage of small business subsidies, even though providing such subsidies seems to be a sound policy decision. When a slippery slope argument hangs as an amorphous dark cloud, without ever being fully explained or dispelled, public policy suffers. This loss of value is an inefficiency of the slippery slope argument.[13]

When the promoters of the slippery slope argument are put to their proof, inefficiencies, if they exist, become clear. In regards to the small business subsidies above, opponents might argue that it is simply unfair to grant subsidies to small businesses and deny them to medium and large businesses. This unfairness argument may at first seem persuasive. How can the council grant subsidies to one sector and deny them to another?

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consideration of the patient's interests).

13. Volokh, *supra* note 1, at 1036. "The existence of the slippery slope creates what I will call the slippery slope inefficiency: decision A might itself be socially beneficial, and many people might agree that it's beneficial; but some swing voters' concern that A will lead to B might prevent decision A from being implemented."

This appears to be a double standard. Actually, a clearly defined standard is the key to dispelling the unfairness argument.

As outlined above, the council found that subsidies for small businesses are cost effective, in line with the city's economic development plan, and sufficiently needed. The council's determination of cost-effectiveness likely means that the projected tax revenue from the increase in small business activity will at least offset the costs of small business subsidies. Presumably, subsidies for larger businesses are not as cost effective. Now a line can be drawn without seeming unfair.

In order to effectively combat a slippery slope argument, it is important to clearly define the rationale for a policy change. Clear standards reduce slippery slope inefficiency by allowing decision makers to use their best judgment with the security that their choices will not lead to disastrous results.

III. THE USE OF THE SLIPPERY SLOPE ARGUMENT IN THE COURTROOM

Slippery slope arguments in the courtroom have a slightly different character than in other public settings.[14] In non-courtroom settings, causal links between X and Y are often inadequately addressed. *Why* will allowing X significantly increase the likelihood of Y? In the courtroom, part of the 'why' is already in place—stare decisis. Courts must consider whether their reasoning for holding X today may mandate holding Y in the future. That said, the use of a slippery slope argument within a single case (where the fact finder is most concerned with specific facts and circumstances) has the same inherent problems as does its use anywhere else. This section is broken into three parts. The first part discusses the use of slippery slope arguments within the context of a single case. The second part discusses slippery slope arguments within the context of precedent. Finally, the third section outlines Justice Scalia's concern about sliding down a slope after the Supreme Court's decision in *Lawrence v. Texas*.[15]

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14. Frederick Schauer, *Slippery Slopes*, 99 HARV. L. REV. 361, 362. Professor Schauer offers a helpful list of examples of reactions to the slippery slope argument in the legal framework. "But why should this be? What induces people to believe that in some cases neither doctrinal limits nor judicial intervention can prevent the slide down the slippery slope? Indeed, the ancient lineage of slippery slope arguments is paralleled by the equally lengthy pedigree of reactions against them. In *Martin v. Hunter's Lessee* 14 U.S. (1 Wheat.) 304, 344 (1810), Justice Story noted that 'it is always a doubtful course, to argue against the use or existence of a power, from the possibility of its abuse.' The same point was made by Justice Holmes when he argued, dissenting in *Panhandle Oil Co. v. Knox* 277 U.S. 218, 223 (1928) (Holmes, J., dissenting), that 'the power to tax is not the power to destroy while this Court sits.' And we are still frequently reminded that one major purpose of doctrine is to provide those very toeholds that keep us from sliding to the bottom of the slippery slope." (footnotes omitted).

15. Lawrence v. Texas, 539 U.S 558 (2003).

A. SLIPPERY SLOPES WITHIN THE CONTEXT OF A SINGLE CASE

When a slippery slope argument is used within the confines of a single case, the precedent-setting concern is not present. Consider *Bertram v. Zoning Commission of the City of Bridgeport.*[16] In that case, a property owner applied for a zoning change in order to operate several small stores on his property. Although his request complied with the city's Comprehensive Plan, a number of residents opposed the change. The residents argued that any business zoning, however small, would make further business zoning more likely. Although the court decided the case on other grounds, it dismissed the protests of the citizens because "[t]he reasons given before the commission by those who opposed the change were quite largely based on fear that other like changes might be made rather than upon the effect of the particular one in question."[17]

The effect that the citizens wanted the court to consider was the diminution of property values that would be caused by not only this re-zoning (X), but by potential future re-zonings (Y). The citizens would have had a much cleaner and more straightforward argument had they limited their protests to X rather than Y.

Consider further *Walz v. Tax Commission of the City of New York.*[18] In that case the Supreme Court upheld as constitutional a New York statute which exempted from property taxes real estate that was used for religious purposes. Concurring in the judgment, Justin Harlan discussed the Court's duty to make fine distinctions:

> I recognize that for those who seek inflexible solutions this tripartite analysis provides little comfort. It is always possible to shrink from a first step lest the momentum will plunge the law into pitfalls that lie in the trail ahead. I, for one, however, do not believe that a 'slippery slope' is necessarily without a constitutional toehold. Like THE CHIEF JUSTICE I am of the view that it is the task of this tribunal to "draw distinctions, including fine ones, in the process of interpreting the Constitution." The prospect of difficult questions of judgment in constitutional law should not be the basis for prohibiting legislative action that is constitutionally permissible. I think this one is, and on the foregoing premises join with the Court in upholding this New York statute.[19]

Here, Justice Harlan makes the seemingly obvious point that it is the role of the Supreme Court to exercise its judgment concerning the constitutionality of statutes. This ability, and the legislature's *awareness* of this ability, is valuable to the process of public policy creation.

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16. Bartram v. Zoning Comm'n of the City of Bridgeport, 68 A.2d 308 (Conn. 1949).
17. *Id.* at 311.
18. Walz v. Tax Comm'n of the City of New York, 397 U.S. 664 (1970).
19. *Id.* at 699–700 (Harlan, J., concurring) (citation omitted).

In *Walz*, Chief Justice Burger provides a more general rebuke of the petitioner's slippery slope argument, which suggested that exempting churches from taxation would lead to a state-established religion.

> Nothing in this national attitude toward religious tolerance and two centuries of uninterrupted freedom from taxation has given the remotest sign of leading to an established church or religion and on the contrary it has operated affirmatively to help guarantee the free exercise of all forms of religious belief. Thus, it is hardly useful to suggest that tax exemption is but the 'foot in the door' or the 'nose of the camel in the tent' leading to an established church. If tax exemption can be seen as this first step toward 'establishment' of religion, as Mr. Justice DOUGLAS fears, the second step has been long in coming. Any move that realistically 'establishes' a church or tends to do so can be dealt with 'while this Court sits.'[20]

While Chief Justice Burger's comments were made with the advantage of hindsight, they point toward an ability of the Court to effectively differentiate between good and bad policy without being handcuffed to the slippery slope. In contrast, the Supreme Court in *Washington v. Glucksberg* upheld a ban on physician assisted suicide because it feared that individual physicians would lack the ability to step off the slippery slope and, in the end, perform involuntary euthanasia.[21] Justice Souter, in his concurrence, provides an in-depth analysis of the Court's understanding of unenumerated liberty interests. He indicated that there may be room within substantive due process for a right to die. However, his decision was informed by practical considerations regarding whether physicians would step off the slippery slope prior to reaching involuntary euthanasia:

> [Physicians] have compassion, and those who would be willing to assist in suicide at all might be the most susceptible to the wishes of a patient, whether the patient was technically quite responsible or not. Physicians, and their hospitals, have their own financial incentives, too, in this new age of managed care. Whether acting from compassion or under some other influence, a physician who would provide a drug for a patient to administer might well go the further step of administering the drug himself; so, the barrier between assisted suicide and euthanasia could become porous, and the line between voluntary and involuntary euthanasia as well. The case for the slippery slope is fairly made out here, not because recognizing one due process right would leave a court with no principled basis to avoid recognizing another, but because there is a plausible case that the right claimed would not be readily containable by reference to facts about the mind that are matters of difficult judgment, or by gatekeepers who are subject to temptation,

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20. *Id.* at 678.
21. Washington v. Glucksberg, 521 U.S. 702 (1997).

noble or not.[22]

Justice Souter provides convincing reasons why allowing assisted suicide may increase the risk of involuntary euthanasia. These reasons include the compassion of doctors as well as unseemly financial concerns. Such reasons demonstrate that involuntary euthanasia is a reasonable expectation of a policy decision to allow assisted suicide.

Concerning issues within a single case, the Court has displayed confidence in its own ability to step off the slope. At other times, when the duty to step of the slope rests in the hands of others and there is too large a risk of unacceptable results, the Court has not expressed confidence that the slope can stepped off of. While purveyors of slippery slope arguments hinge their concerns on an inability to apply the brakes at reasonable stopping points, this stopping action is one of the primary purposes of our court system. Because not all legal decisions are as simple as applying the law to facts, we have entrusted judges to discern when we can safely step off the slope.

B. CONCERNING PRECEDENT

While a court can compartmentalize the use of a slippery slope argument within a single case, the precedential effect of any one case upon another creates a separate inquiry. This inquiry considers how today's decision (X) affects the likelihood of an undesirable future decision (Y) (where Y would not occur but for X). The concern in the previous section was the effect that a decision would have upon policy makers outside the judiciary, whereas the concern in this section is the effect that judicial decisions may have upon subsequent judicial decisions.

How can this new concern be overcome? Judges could decide not to publish *any* of their opinions. But this would lead to the end of case citations in all legal documents—a slippery slope, indeed. Obviously, this 'solution' will not work. Since abandoning precedent is unacceptable, a different solution to the concern must be found.

Even Justices of the Supreme Court have disagreed on how to resolve this concern. This is illustrated by a discourse between Justices Harlan and White. In *Baldwin v. New York*, Justice Harlan asked in his dissent, "if 12 jurors are not essential, why are six? What if New York. . .concludes that three jurors are adequate. . .?"[23] Justice White, in *Williams v. Florida* (issued on the same day as *Baldwin*), immediately responded to Justice Harlan by noting that Harlan's logic "suffers somewhat as soon as one recognizes that he can get off the 'slippery slope' before he reaches the

22. *Id.* at 784–85.

23. Baldwin v. New York, 399 U.S. 66, 126 (1970) (Harlan, J., dissenting).

bottom. We have no occasion in this case to determine what minimum number can still constitute a 'jury,' but we do not doubt that six is above that minimum."[24]

It is this author's opinion that decisions about where to draw the line need not be arbitrary. Courts may look to historical context, constitutional principles, and their reasonable discretion to draw lines at proper stopping points. Courts should be able to determine when they have found something like Dworkin's 'right answer.'[25]

C. BLOCKING THE ROAD FOR THE PARADE OF HORRIBLES

Justice Scalia articulates serious concerns with slippery slopes in his *Lawrence* dissent. He first outlines what he believes is the misuse of historical context and constitutional principles in the progression of substantive due process cases.[26] He further argues that the Court has invalidated society's moral views on sexual behavior as legitimate grounds upon which law may be based. Of interest here is Justice Scalia's parade of horribles.[27]

> [It is] society's belief that certain forms of sexual behavior are "immoral and unacceptable." This is the same justification that supports many other laws regulating sexual behavior that make a distinction based upon the identity of the partner—for example, laws against adultery, fornication, and adult incest, and laws refusing to recognize homosexual marriage.[28]

> State laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity are likewise sustainable only in light of *Bowers'* validation of laws based on moral choices. Every single one of these laws is called into question by today's decision.[29]

Justice Scalia's concerns are not without force. If the reasoning in *Lawrence* is extended, then laws that are based solely upon societal beliefs about what is immoral and unacceptable will be open to challenge. However, some laws of concern to Justice Scalia have broader

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24. Williams v. Florida, 399 U.S. 78, 92 & n.28 (1970); *see also id.* at 116–17 (Marshall, J., dissenting) (a defense of Justice Harlan's argument).

25. RONALD DWORKIN, A MATTER OF PRINCIPLE (Harvard Univ. Press 1985) (Professor Dworkin argues against the proposition that there are no right answers in hard cases. Rather, that there is almost always a right answer even if it is not known).

26. *Lawrence*, 539 U.S. at 594–98.

27. Justice Frankfurter was the first Supreme Court Justice to use the term 'parade of horribles' in an opinion. In his dissent he argued that allowing the government to search a private residence for business records "is not 'a parade of horribles.'" Shapiro v. U.S., 335 U.S. 1, 55 (1948).

28. *Lawrence*, 539 U.S. at 600 (citations omitted).

29. *Id.* at 590 (citations omitted).

justifications. Adult incest may lead to an increased rate of genetic deformities among children, and prostitution presents a danger of violent crime to women; laws against these acts do not rely solely upon morality.

Even if it could be shown that Scalia's parade of horribles may be legally avoided without employing morals legislation, his argument still carries a great deal of rhetorical force. Looking at the central piece of Scalia's parade of horribles—that the reasoning in *Lawrence* will increase the likelihood of lifting prohibitions against gay marriage—in order for this argument to be effective, one must share Scalia's negative attitude toward gay marriage. It stands to reason that for those who believe society is in a freefall of moral decay, Scalia's incantations are more proof of the future evils that *Lawrence* is likely to bring about. If one agrees that the bottom of the slope identified by Scalia is undesirable and that the current decision makes that consequence more likely, then the slippery slope argument has been successfully employed.

IV. CONCLUSION

As has been shown, the slippery slope argument tends to offer a choice between two unacceptable options, which adds little value to the search for sound public policy. Although a slippery slope argument may be a useful tool for critically analyzing an opposing argument, its inherent tendency to foster poor decision making should caution policy makers to avoid its use. It is this author's contention that if given a choice, policy makers would be wise to base their decisions on principle and reason rather than the fear of sliding down a slope.